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10 AMERICANWEST BANCORPORATION

11  
12 UNITED STATES BANKRUPTCY COURT  
13 EASTERN DISTRICT OF WASHINGTON  
14

15 In re  
16 AMERICANWEST  
17 BANCORPORATION,  
18 Debtor.

Case No. 10-06097-PCW-11

Chapter 11

**MOTION OF AWBC FOR ENTRY  
OF ORDER (I) AUTHORIZING  
AWBC TO OBTAIN  
POSTPETITION FINANCING ON A  
SENIOR SECURED,  
SUPERPRIORITY BASIS; AND  
(II) AUTHORIZING THE USE OF  
CASH COLLATERAL**

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25  
26  
MOTION FOR DIP FINANCING

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MOTION FOR DIP FINANCING - iv

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1 AmericanWest Bancorporation (“AWBC”), the debtor and debtor-in-  
2 possession in the above-captioned case (the “Case”), hereby moves this Court  
3 (the “Motion”) pursuant to sections 105, 361, 362, 363(c)(2), and 364(c)(1), and  
4 364(c)(3) of title 11 of the United States Code (as amended, the “Bankruptcy  
5 Code”), Rules 2002, 4001(c), and 9014 of the Federal Rules of Bankruptcy  
6 Procedure (as amended, the “Bankruptcy Rules”), and Rule 4001-2 of the Local  
7 Rules for the United States Bankruptcy Court for the Eastern District of  
8 Washington (the “Local Rules”), for entry of an order (the “DIP Order”):

9 (I) authorizing AWBC to obtain postpetition financing pursuant to a  
10 debtor-in-possession credit agreement, substantially in the form  
11 annexed hereto as Exhibit A (as amended, supplemented, or  
12 otherwise modified from time to time, the “DIP Credit  
13 Agreement”) by and between AWBC, as borrower, and SKBHC  
14 Hawks Nest Acquisition Corp., as lender (together with its  
15 successors and assigns, the “DIP Lender”), and together with all  
16 other related agreements, documents, and instruments  
17 contemplated thereby (collectively, the “DIP Credit Documents”),  
18 including authorizing AWBC to borrow up to the principal  
19 aggregate sum of \$2,000,000, plus all other interest, fees, and  
20 expenses due and payable under the DIP Credit Documents (the  
21 “Obligations”), such financing to be (A) secured by first-priority  
22 senior secured liens on all unencumbered tangible and intangible  
23 property of AWBC of any kind, as covered by the DIP Credit  
24 Documents (other than Avoidance Actions and the proceeds  
25 therefrom), subject only to the carve-out for fees of the Debtor’s  
26 professionals (as more particularly defined in the DIP Credit

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1 Agreement, the “Carve-Out”), pursuant to section 364(c)(2) of the  
2 Bankruptcy Code, and (B) secured by a perfected lien upon all  
3 tangible and intangible property of AWBC that is subject to and  
4 junior to the Carve-Out and the Permitted Liens (as defined in the  
5 DIP Credit Documents) pursuant to section 364(c)(3) of the  
6 Bankruptcy Code;

7 (II) granting the DIP Lender superpriority administrative claims in the  
8 Case pursuant to section 364(c)(1) of the Bankruptcy Code, such  
9 claims to be senior in right of payment over any and all  
10 administrative expenses of the kinds specified in sections 503(b)  
11 and 507(a) of the Bankruptcy Code or otherwise, subject only to  
12 the Carve-Out (such credit facility being referred to herein as the  
13 “DIP Facility”); and

14 (III) authorizing AWBC to use Cash Collateral (as defined below)  
15 pursuant to section 363(c) of the Bankruptcy Code.

16 At the hearing on this Motion, AWBC will request entry of the DIP  
17 Order substantially in the form attached hereto as Exhibit B. In support of this  
18 Motion, AWBC relies upon and incorporates by reference the *Declaration of*  
19 *Patrick J. Rusnak, Chief Executive Officer of AmericanWest Bancorporation, in*  
20 *Support of Chapter 11 Petition and First Day Pleadings*, filed with the Court  
21 concurrently herewith (the “Rusnak Declaration”). The facts described in the  
22 Rusnak Declaration are hereby incorporated into this Motion as though set forth  
23 herein in full. In further support of this Motion, AWBC, by and through its  
24 undersigned counsel, respectfully represents as follows:<sup>1</sup>

25 \_\_\_\_\_  
26 <sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings  
(Footnote continued on next page)

## JURISDICTION AND VENUE

1  
2           1.     This Court has jurisdiction to consider this Motion pursuant  
3 to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C.  
4 § 157(b). Venue of this case and this Motion in this District is proper under 28  
5 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested  
6 herein are sections 105, 361, 362, 363(c)(2), and 364(c)(1), and 364(c)(3) of the  
7 Bankruptcy Code, Bankruptcy Rules 2002, 4001(c) and 9014, and Local Rule  
8 4001-2.

## BACKGROUND

### A.     General Background

9  
10  
11           2.     On the date hereof (the “Petition Date”), AWBC filed a  
12 voluntary petition in this Court for relief under chapter 11 of the Bankruptcy  
13 Code. The factual background regarding AWBC, including its business  
14 operations, its capital and debt structure, and the events leading to the filing of  
15 this bankruptcy case, is set forth in detail in the Rusnak Declaration.

16           3.     AWBC continues to manage and operate its business as  
17 debtor-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

18           4.     Founded in 1983, AWBC, headquartered in Spokane,  
19 Washington, is a Washington corporation registered as a bank holding company  
20 under the Bank Holding Company Act of 1956. AWBC is the direct or indirect  
21 corporate parent of two non-debtor subsidiaries: AmericanWest Bank (the  
22 “Bank”), a Washington state-chartered bank that is insured by the Federal  
23 Deposit Insurance Corporation (“FDIC”) and wholly-owned by AWBC; and  
24 AmericanWest Holdings, Inc., a Washington corporation that is wholly-owned  
25  
26 ascribed to them in the Rusnak Declaration or in the DIP Order.



1 by the Bank. The Bank operates in Eastern and Central Washington and  
2 Northern Idaho, and in Utah where it conducts business under the tradename of  
3 “Far West Bank.” Unless otherwise indicated, references herein to the  
4 “Company” collectively refer to AWBC and the Bank.

5           5. AWBC functions as a holding company for the Bank, which  
6 is its primary asset. The Bank gathers deposits and provides loans to  
7 approximately 77,000 customers across the Inland Northwest through branches  
8 located primarily in Spokane, Yakima, Walla Walla, and the Tri-Cities area.  
9 The Bank serves customers in a total of 58 branches, including a branch in Salt  
10 Lake City, Utah, and branches in suburban and rural communities in Eastern  
11 and Central Washington, Northern Idaho, and Utah. As of the Petition Date, the  
12 Company collectively had approximately 540 employees across its 58 branches  
13 and two support facilities.

14           6. The Bank offers agricultural loan products and commercial  
15 loan products to hundreds of farmers and small businesses across its market  
16 areas in Washington, Idaho, and Utah. The Bank offers a variety of deposit  
17 accounts to both consumer and business customers, including checking  
18 accounts, money market demand accounts, and savings accounts. Numerous  
19 services also provide the Bank’s consumer and business customers with  
20 convenient bank access, including ACH origination, remote check capture (i.e.,  
21 on-site imaging and electronic processing of checks), sweep accounts, and  
22 currency services. The Bank also generates non-interest income by offering  
23 both consumer and business credit cards and merchant bankcard services  
24 through arrangements with third-party providers.

25           7. The Bank and AWBC are highly regulated institutions. The  
26 principal regulators of the Bank are the FDIC and the Washington Department

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1 of Financial Institutions (the “DFI”). The principal regulators of AWBC are the  
2 Board of Governors of the Federal Reserve System and the Federal Reserve  
3 Bank of San Francisco. Unless context otherwise requires, references herein to  
4 the “Regulators” collectively refer to these four state and federal regulatory  
5 agencies.

6 8. ***The Bank’s Capital Structure and AWBC’s TruPS.***

7 AWBC’s 100% equity ownership in the Bank totals 429,000 issued and  
8 outstanding shares of common stock of the Bank, no par value (the “Shares”).  
9 No other shares of capital stock of the Bank are issued or outstanding. All of  
10 the Shares are beneficially owned and held by AWBC, have been duly  
11 authorized and validly issued, are fully paid and nonassessable, have been  
12 issued in full compliance with all applicable securities laws and other applicable  
13 legal requirements, and are free and clear of any and all Encumbrances (as  
14 defined in the DIP Credit Agreement).

15 9. As of September 30, 2010, AWBC had outstanding  
16 unsecured indebtedness totaling approximately \$47.2 million,<sup>2</sup> consisting of:  
17 (a) four outstanding issuances of junior subordinated debentures issued to four  
18 statutory trusts (the “Trusts”) that in turn issued their preferred securities,  
19 commonly known as Trust Preferred Securities or “TruPS,” to investors; and  
20 (b) approximately \$3,600 in trade debt. AWBC’s principal amount of junior  
21 subordinated debt was approximately \$41.2 million, which backs exactly \$40  
22

---

23 <sup>2</sup> This total includes the \$6.0 million of accrued deferred interest relating to  
24 the issuance of TruPS. Such interest, however, has not been capitalized and is  
25 not included in the principal balance of \$41.2 million described herein.  
26

1 million of TruPS issued to investors.<sup>3</sup> The accrued interest on the junior  
2 subordinated debentures totaled \$6.0 million, payment of which has been  
3 deferred since September 2008 in accordance with the declarations of trust  
4 governing the subordinated indentures. Wilmington Trust Company acts as  
5 trustee of two of the Trusts and U.S. Bank acts as trustee of the other two  
6 Trusts.

7           10. As detailed more specifically in the Rusnak Declaration,  
8 each of the four TruPS issuances, corresponding to AWBC's junior  
9 subordinated debentures (the "AWBC TruPS"), was sold as a block into a  
10 separate limited liability company (each a "PreTSL").<sup>4</sup> Each PreTSL issued  
11 several tranches, or priorities, of notes (e.g., Class A-1 Senior Notes, Class A-2  
12 Senior Notes, Mezzanine Notes, and Subordinated Notes) to numerous  
13 institutional and accredited individual investors through offerings exempt from  
14 securities registration. Each PreTSL's notes are collateralized with the TruPS

---

16 <sup>3</sup> The excess amount of the debentures over the amount of the TruPS  
17 represents the common equity of the Trusts, which is held by AWBC. The  
18 common equity interest has no economic value.

19 <sup>4</sup> "PreTS<sup>SM</sup>" is a registered service mark, derived from "Preferred Term  
20 Securities," another term for trust preferred securities. "PreTSL" is the  
21 common shorthand for each of the limited liability companies that has issued  
22 TruPS collateralized by AWBC's junior subordinated debentures, with each  
23 such company having a name in the form of "Preferred Term Securities [ ]  
24 Limited" with the "[ ]" representing the Roman numeral designating the  
25 specific entity.  
26

1 held by that PreTSL, along with TruPS and debt obligations of other entities.  
2 The PreTSLs are unmanaged, pooled collateralized debt obligations (or  
3 “CDOs”), with Bank of New York Mellon (“BNYM”) acting as CDO trustee  
4 under the indenture applicable to each PreTSL. BNYM has limited authority to  
5 make decisions with respect to the CDOs and the collateralized assets. Direct  
6 ownership of the notes issued by the CDOs is widely dispersed, and identifying  
7 the ultimate investors is extremely difficult.

8           11. ***The Company’s Objectives.*** As described below, the Bank  
9 has been subject to significant regulatory action by the Regulators for over two  
10 years. If AWBC is unable to recapitalize the Bank promptly, it faces possible  
11 seizure of the Bank by the DFI and appointment of the FDIC as receiver. Based  
12 on the ratio of asset size to loss to the FDIC’s deposit insurance fund for all  
13 bank failures during 2010, a receivership for the Bank could result in a \$330  
14 million dollar loss to the FDIC’s Deposit Insurance Fund—resulting in a total  
15 loss for AWBC and its creditors.

16           12. AWBC has commenced this Chapter 11 case as the only  
17 plausible mechanism to recapitalize the Bank while protecting, to the greatest  
18 extent possible, AWBC’s creditors. By commencing this Chapter 11 case,  
19 AWBC hopes to sell its 100% equity ownership in the Bank and the Other  
20 Purchased Assets (as defined in the APA described below) on an expedited  
21 basis, concurrently with the recapitalization of the Bank by the Purchaser  
22 (defined below) in order to comply with regulatory requirements.

23           13. Absent a sale of the Shares and the Other Purchased Assets  
24 to a sufficiently capitalized and qualified bank or bank holding company  
25 concurrent with a significant capital infusion by the Purchaser, the Bank will  
26 not meet the Regulators’ capital requirements and will not be financially viable

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1 on an ongoing basis. The Purchaser presents the Bank with a solution to this  
2 dilemma—a proposed acquirer with the requisite financial resources to acquire  
3 and recapitalize the Bank and with the regulatory posture to obtain regulatory  
4 approval for the transaction (having been approved on October 26, 2010 by the  
5 Federal Reserve Board to become a bank holding company).

6 14. Any course of action other than a sale of the Shares and the  
7 Other Purchased Assets will preclude the return of any value to the creditors or  
8 shareholders of AWBC, and would have adverse consequences for the Bank's  
9 customers, communities, and employees. An expedited sale of the Shares and  
10 the Other Purchased Assets at the best possible price, with the Purchaser's  
11 commitment to concurrently recapitalize the Bank, is therefore the only feasible  
12 way to establish the Bank as a viable institution on an ongoing basis and  
13 protect, to the greatest extent possible, AWBC's creditors and other  
14 stakeholders.

15 **B. Factors Leading to the Sale**

16 15. The current financial and credit crisis — resulting in  
17 approximately 250 nationwide bank failures since 2008<sup>5</sup> — has significantly  
18 hampered the Bank's business and ability to meet certain state and federal  
19 regulatory requirements for capital, profitability, and credit quality. Beginning  
20 approximately three years ago, effects from the housing crisis, including  
21 tumbling home prices, soaring loan defaults, and high unemployment rates,  
22

---

23 <sup>5</sup> Twenty-five banks failed and were taken over by the FDIC in 2008,  
24 while 140 failed in 2009. Over 130 banks have failed thus far in 2010. *See*  
25 <http://www.fdic.gov/bank/individual/failed/banklist.html>.  
26

1 began to take their toll on the Bank's, and ultimately the Company's, financial  
2 condition.

3 **C. The Company's Efforts to Recapitalize**

4 16. Beginning in 2007, the Company's management initiated  
5 efforts to deal with asset quality problems in its loan portfolio, reduce expenses,  
6 build capital reserves, and take other appropriate actions to return the Bank to  
7 profitability and reduce its risk profile. However, in early 2008 it became clear  
8 to the Company's management and Board of Directors that additional capital  
9 would be required to address the Bank's financial problems.

10 17. Beginning in 2008 and continuing to the present, the  
11 Company has undertaken significant efforts to raise additional capital, including  
12 efforts to sell Bank assets, or to sell AWBC or the Bank to another financial  
13 institution. AWBC's multi-phased marketing effort is described more fully in  
14 the Rusnak Declaration.

15 **D. State and Federal Regulatory Actions**

16 18. The Company's inability heretofore to raise additional  
17 capital has been a major cause of increased scrutiny and action by the  
18 Regulators and creates significant risk that the Bank will be seized if not  
19 recapitalized on an expedited time frame consistent with the transactions  
20 described herein. A recapitalization of the Bank is critical if the Bank is to be  
21 restored to financial viability on an ongoing basis.

22 19. As a result of the Bank's announcement that it had ceased to  
23 be "well-capitalized" as of June 30, 2008, the DFI conducted an off-site interim  
24 examination of the Bank's financial health. This led to the first of a series of  
25 increasingly serious enforcement actions against the Bank or AWBC by the  
26 FDIC, DFI, and the Federal Reserve Bank of San Francisco ("FRB"), which

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1 regulates AWBC as a bank holding company. First, the DFI issued a  
2 Supervisory Directive against the Bank effective August 8, 2008 (the “DFI  
3 Directive”). The DFI Directive required the Bank to provide periodic liquidity  
4 and credit quality reports, update the DFI regarding the status of liquidity  
5 planning and previously announced capital raising initiatives, notify the DFI  
6 about significant changes in management and financial condition, retain a  
7 permanent Chief Executive Officer, and seek prior written consent of the DFI  
8 before paying dividends.<sup>6</sup>

9           20. Second, on February 2, 2009, the FDIC issued a Prompt  
10 Corrective Action Notification (the “PCA Notification”) to the Bank. The PCA  
11 Notification was issued under the Prompt Correction Action provisions of the  
12 FDIA and FDIC regulations. The FDIA and FDIC regulations identify five  
13 capital categories for banking institutions — well-capitalized, adequately  
14 capitalized, undercapitalized, significantly undercapitalized, and critically  
15 undercapitalized. The PCA Notification formally advised the Bank that it was  
16 significantly undercapitalized, which is the next-to-lowest capital category. As  
17 such, the Bank was required to submit a capital restoration plan (the “Capital  
18 Restoration Plan”), and it became subject to a wide range of restrictions relating  
19 to its senior management team, management compensation, dividends, loan loss  
20 reserves, reductions in troubled assets, liquidity, asset growth, and other aspects  
21 of its business. In response to the PCA Notification, the Bank submitted its  
22 Capital Restoration Plan to the FDIC on March 20, 2009, which the Bank

23  
24 <sup>6</sup> On September 17, 2009, the DFI notified the Bank that the DFI Directive  
25 was being rescinded, as it had been effectively superseded by the PCA  
26 Directive discussed below.



1 subsequently amended on July 2, 2009. That Capital Restoration Plan was  
2 rejected.

3           21. Third, on May 8, 2009, the Bank entered into a Stipulation  
4 and Consent to the Issuance of an Order to Cease and Desist (the “Stipulation”)  
5 with the FDIC and the DFI. Pursuant to the Stipulation, the FDIC and the DFI  
6 issued an Order to Cease and Desist (the “Cease and Desist Order”) against the  
7 Bank on May 11, 2009. The Cease and Desist Order required, among other  
8 things, that the Bank take actions necessary to return to the “well-capitalized”  
9 category by September 9, 2009.

10           22. Fourth, on September 15, 2009, AWBC entered into a  
11 Written Agreement (the “Written Agreement”) with the FRB, imposing on  
12 AWBC restrictions and requirements substantially similar to those contained in  
13 the PCA Notification and the Cease and Desist Order, including the obligation  
14 to submit a capital restoration plan.

15           23. Fifth, on February 26, 2010, the Bank received a Prompt  
16 Corrective Action Directive (the “PCA Directive”) from the FDIC. The PCA  
17 Directive directed the Bank to recapitalize within 30 days of receipt, and  
18 reiterated various requirements previously imposed on the Bank by the Cease  
19 and Desist Order.

20           24. Taken together, the Cease and Desist Order and the PCA  
21 Directive required the Bank, among other things, to recapitalize or accept an  
22 offer to be acquired by or combine with another financial institution by March  
23 28, 2010.

24           25. Although the Company’s management has undertaken all  
25 actions within its power to comply with all aspects of the PCA Notification, the  
26 Cease and Desist Order, the Written Agreement, and the PCA Directive

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1 (collectively, the “Regulatory Orders”), the Company has to date been unable to  
2 comply with their most important terms — the recapitalization or sale of the  
3 Bank. Full satisfaction of the Regulatory Orders will depend on raising a  
4 significant amount of additional capital. A recapitalization of the Bank is the  
5 only path for restoring the Bank to financial viability on an ongoing basis.

6           26. The Bank continues to remain in the significantly  
7 undercapitalized capital category. Any undercapitalized banking institution,  
8 and particularly one that has failed to comply with an order to recapitalize, is  
9 subject to a wide variety of enforcement remedies by the FDIC, including  
10 seizure by the DFI and placement in an FDIC receivership. If this occurs, past  
11 experience uniformly points to an unhappy set of results: the shareholders’  
12 investment in the banking institution immediately will be wiped out (with the  
13 creditors of the shareholders being adversely affected as well), the institution  
14 will be sold or liquidated at a substantial loss to the FDIC’s deposit insurance  
15 fund, many of the institution’s employees will lose their jobs, customers with  
16 deposits in excess of FDIC insurance limits are at risk of losing that portion of  
17 their deposits, borrowers may be deprived of needed financing, and the  
18 communities served by the institution will be adversely impacted by its loss.

19           27. Following the seizure, the FDIC, as receiver, may bring civil  
20 actions against directors, officers, parent companies, and third parties in an  
21 effort to recover losses for the receivership estate. The FDIC also can exercise  
22 other enforcement remedies which, depending upon the circumstances, may  
23 include the imposition of severe civil money penalties against the institution, its  
24 parent companies, officers, directors, employees, and other institution-affiliated  
25 parties; removal of directors, officers, and other institution-affiliated parties  
26 from participating in the affairs of the institution (or, indeed, participating in the

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1 affairs of any other insured depository institution and certain government  
2 agencies); or terminating the institution's FDIC insurance.

3           28. During the current financial crises, very few, if any, banking  
4 institutions that have received prompt corrective action directives have been  
5 able to avoid seizure and FDIC receivership and loss of the shareholders'  
6 complete investment. A review of prompt corrective action directives issued  
7 since January 2009 in the FDIC's Western Region — in which the Bank is  
8 included — indicates that 26 of the 30 banks that received such directives were  
9 ultimately seized by the FDIC. On average, the time between the deadline for  
10 compliance with a prompt corrective action directive and the seizure of the  
11 institution was only 68 days. The Bank has already gone over 240 days since it  
12 failed to comply with the PCA Directive's capital raising requirement, which  
13 AWBC believes is indicative of the FDIC's and DFI's agreement not to object  
14 to the Sale. The period of time that the Bank has continued to exist, when  
15 contrasted with the experience of other banking institutions in the Western  
16 Region, is unique. The experience of these other banks demonstrates that no  
17 banking institution that is significantly undercapitalized could reasonably  
18 expect to remain open for such a period of time.

19 **E. Entry into the APA**

20           29. Following its comprehensive marketing efforts, after 30  
21 months of strategic analysis and negotiations, including discussions with the  
22 Regulators and the FRB, the Company, in consultation with Sandler O'Neill &  
23 Partners, L.P., a recognized investment banking firm with particular experience  
24 with respect to financial institutions, retained to advise and assist the Company  
25 in raising additional capital, identified the bid by the DIP Lender (in its capacity  
26 as purchaser, the "Purchaser"), for the Shares and the Other Purchased Assets

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1 as the only viable way to accomplish the necessary recapitalization of the Bank  
2 and to protect the interests of AWBC's creditors. After extensive negotiations  
3 regarding the terms and conditions thereof, AWBC and the Purchaser have  
4 agreed, in principle, to the key terms of the sale of the Shares to the Purchaser  
5 proposed contemporaneously herewith (the "Sale"), and have executed an asset  
6 purchase agreement with the Purchaser (the "APA"), which remains subject to  
7 this Court's approval.

8           30. If effectuated, the Sale will recapitalize the Bank, ensure the  
9 Bank's regulatory compliance, maximize the value available for AWBC's  
10 creditors, preserve hundreds of jobs, and save the FDIC many millions of  
11 dollars, while simultaneously allowing the Bank to continue serving the needs  
12 of thousands of individuals and businesses in the Bank's market areas.

13 **F. Discussions with the Regulators**

14           31. During the months preceding this Chapter 11 filing, the  
15 Company's management has engaged in numerous detailed discussions and in-  
16 person meetings with the Regulators to keep them apprised of its  
17 recapitalization efforts. Many of these conversations focused on the  
18 requirements of the Regulators for approval of a sale and recapitalization of the  
19 Bank, and whether the FDIC and DFI would defer regulatory action long  
20 enough to allow recapitalization to proceed. Generally, throughout the process,  
21 the Regulators have remained supportive of the Company's recapitalization  
22 efforts. Within the last three months, the Company introduced to the  
23 Regulators, in a number of meetings, the prospect of a Section 363 bankruptcy  
24 sale as the potential key to overcome the obstacles that the Company had  
25 encountered in its recapitalization efforts. Shortly thereafter, the Purchaser  
26 emerged as a potential party to such a transaction, and thereafter both

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1 representatives of the Purchaser and management of the Company explored in  
2 depth with the Regulators the proposed transaction, including the bankruptcy  
3 sale process that is the subject of this Motion.

4 32. As the transaction will require regulatory approval, the  
5 Regulators will need to evaluate the regulatory applications that Purchaser  
6 contemplates submitting within a matter of days before passing on the  
7 transaction. However, the Regulators have not objected to this bankruptcy  
8 filing or otherwise to the path on which the Company has embarked to secure  
9 adequate capital for the Bank.

#### 10 **G. The DIP Facility**

11 33. In order to help reduce the risk of adverse supervisory action  
12 before a sale of the Shares and the Other Purchased Assets can be  
13 consummated, AWBC has negotiated the DIP Facility to obtain the working  
14 capital necessary to fund AWBC's Chapter 11 case. Among other features, the  
15 DIP Facility includes certain safeguards for the DIP Lender's protection as a  
16 debtor-in-possession lender, since as a lender it bears the full risk of any decline  
17 in the value of the Shares and the Other Purchased Assets that would serve as  
18 its collateral.

19 34. In accordance with the relief sought in this Motion and the  
20 terms of the DIP Order, the DIP Lender has agreed to allow AWBC to utilize  
21 the cash collateral generated by the DIP Lender's collateral. The DIP Lender  
22 has also agreed to provide AWBC with debtor-in-possession financing under  
23 the DIP Credit Agreement, secured by a senior secured, superpriority lien on  
24 AWBC's assets and the proceeds thereof.

25 35. AWBC has an immediate need to access additional  
26 operating capital in order to fund the day-to-day operating expenses of its

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1 business, including payments to remaining employees and professionals sought  
2 to be retained in this Chapter 11 case. Such payments are necessary to sustain  
3 the going-concern value of the Bank and ensure its future viability. Moreover,  
4 access to additional operating capital will enable AWBC to demonstrate to its  
5 regulating entities, vendors, suppliers, and employees that it has sufficient  
6 liquidity to continue to operate its business, maintain its properties, and pay  
7 necessary expenses during the crucial first days of its reorganization efforts and  
8 the pendency of this Chapter 11 case.

9           36. In order to obtain much-needed capital and help reduce the  
10 risk of adverse regulatory intervention before consummation of the Sale,  
11 AWBC negotiated the DIP Credit Agreement with the Purchaser through a  
12 good faith and arm's-length process. AWBC believes that the DIP Credit  
13 Agreement contains terms that are in the best interests of AWBC, its estate, and  
14 other parties-in-interest.

15           37. As set forth in the DIP Credit Agreement, and subject to the  
16 terms and conditions thereof, Purchaser has agreed to provide the DIP Facility  
17 with a total commitment of up to \$2 million.

18           38. Approval of the DIP Credit Agreement will not only ensure  
19 that AWBC's estate will be administratively solvent, but will also help  
20 maximize ultimate recovery for AWBC creditors. Without authorization of the  
21 DIP Credit Agreement, AWBC will be unable to fund its Chapter 11 case, or  
22 pay for services and expenses necessary to preserve and maximize the value of  
23 AWBC's business. Indeed, absent sufficient funds to support its business, the  
24 value of the Shares will quickly erode, as will AWBC's ability to consummate  
25 the Sale. Moreover, Bank seizure and FDIC receivership would be imminent,  
26

1 causing irreparable harm to AWBC's estate, employees, creditors, customers,  
2 and other stakeholders.

3 **RELIEF REQUESTED<sup>7</sup>**

4 39. By this Motion, AWBC requests that the Court grant the  
5 following relief:

6 (a) pursuant to Bankruptcy Code sections 105, 361, 362,  
7 364(c)(1), 364(c)(2), and 364(c)(3), Bankruptcy Rules 2002, 4001(c) and 9014,  
8 and Local Rule 4001-2:

9 (i) authorization for AWBC to obtain postpetition loans,  
10 advances, and other financial accommodations under  
11 the DIP Credit Documents in the amount of up to  
12 \$2 million in accordance with the budget attached to  
13 the DIP Order (the "Budget");<sup>8</sup>

14 (ii) authorization for AWBC to comply with the DIP  
15 Credit Documents in all respects, and approval of all  
16 of the terms and conditions of the DIP Credit  
17 Documents;

18  
19  
20 <sup>7</sup> The description of the terms of the proposed DIP Order provided in this  
21 Motion is intended only as a summary. In the event of any inconsistency  
22 between the descriptions set forth herein and the terms of the proposed DIP  
23 Order, the terms of the DIP Order shall govern.

24 <sup>8</sup> Obligations incurred under the DIP Credit Documents are referred to  
25 herein as the "DIP Obligations."  
26

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- 1 (iii) subject to the Carve-Out, grant the DIP Lender  
2 superpriority administrative expense claims with  
3 respect to the DIP Facility Collateral (defined below)  
4 with priority over all other administrative expenses of  
5 the kind specified in Bankruptcy Code section 503(b)  
6 or 507(b) (the “Superpriority Claims”) pursuant to  
7 section 364(c)(1) of the Bankruptcy Code with respect  
8 to all the DIP Obligations;
- 9 (iv) subject to the Carve-Out, grant the DIP Lender, as  
10 security for the DIP Obligations, perfected, valid,  
11 enforceable, and non-avoidable first-priority security  
12 interests under Bankruptcy Code section 364(c)(2)  
13 (the “364(c)(2) Liens”) in all tangible and intangible  
14 assets of AWBC, including without limitation all  
15 issued and outstanding Shares of the Bank now owned  
16 or hereafter acquired by AWBC as covered by the  
17 DIP Credit Documents (the “Assets”) as well as all  
18 proceeds, products, rents, and profits thereof,  
19 including all cash from the payment of dividends or  
20 interest on the Shares, together with all other property  
21 described in Bankruptcy Code section 363(a) and  
22 applicable case law constituting “cash collateral” (the  
23 “Cash Collateral” and together with the Assets, the  
24 “DIP Facility Collateral”), not otherwise encumbered  
25 by Permitted Liens (as defined in the DIP Credit  
26 Agreement);

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- (v) subject to the Carve-Out, grant the DIP Lender, as security for the DIP Obligations, the best available junior, perfected security interest under Bankruptcy Code section 364(c)(3) (the “364(c)(3) Liens”) in all DIP Facility Collateral which is subject to the Permitted Liens (collectively with the 364(c)(2) Liens and the 364(c)(3) Liens, the “DIP Facility Liens”); and
- (vi) waiver of AWBC’s right to surcharge the DIP Facility Collateral under Bankruptcy Code section 506(c) except as otherwise contemplated by the budget attached hereto as Exhibit C; and
- (b) the granting of certain related relief.

#### **SUMMARY OF PRINCIPAL TERMS OF POSTPETITION FINANCING**

40. AWBC and the DIP Lender negotiated the DIP Credit Agreement, through a good faith and arm’s-length process. The following summary sets forth the material terms of the DIP Facility.<sup>9</sup>

---

<sup>9</sup> This summary of the DIP Credit Agreement is provided for the benefit of the Court and other parties in interest. A copy of the DIP Credit Agreement is attached hereto as Exhibit A and incorporated herein by reference. Capitalized terms used in this summary but not otherwise defined herein shall have the meanings set forth in the DIP Credit Agreement.



<b>Commitment Amount:</b>	Aggregate principal amount not to exceed \$2,000,000.
<b>Interest Rates:</b>	9.00% per annum; provided, however, that if the scheduled maturity is extended to a date 60 days after the date of the DIP Credit Agreement, the interest rate will be 10.0% per annum starting on the 45th day after the date of the DIP Credit Agreement and thereafter.
<b>Term and Repayment:</b>	<p><u>Scheduled Maturity Date:</u> 45 days after the date of the DIP Credit Agreement (projected December 2010).</p> <p>AWBC may extend the scheduled maturity date to 60 days after the date of the DIP Credit Agreement if not in default, if representations and warranties remain true and correct in all material respects, and if AWBC pays a fee of 2.0% of the outstanding loan amount.</p>
<b>Procedure for Borrowing:</b>	Delivery of loan notice no later than 10:00 a.m. (New York City time) on the closing date. DIP Lender to wire funds no later than 3:00 p.m. (New York City time) that day.
<b>Collateral:</b>	All of the assets of AWBC (subject to customary exclusions), including all of the issued and outstanding shares of common stock of the Bank.
<b>Priority:</b>	DIP Lender to be granted a superpriority administrative expense claim, subject to customary Carve-Out for fees of AWBC's retained professionals, and other specified bankruptcy filing costs.
<b>Representations and Warranties:</b>	Due organization, existence, and compliance with law; due authorization to enter agreement, and enforceability of obligations; no legal bar to obligations; no default; financial statements prepared in accordance with GAAP; budget prepared and delivered in good faith; AWBC has good and marketable title to collateral; loan documents sufficient to provide superpriority lien.

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<b>Conditions Precedent:</b>	Delivery of executed loan documents, including collateral documents and opinion of counsel; payment of fees and expenses of DIP Lender, including DIP Lender's counsel; governmental and third-party authorizations; order entered by Bankruptcy Court approving the loan; all "first-day" orders in form and substance approved by DIP Lender; submission of initial budget; representations and warranties true and correct; no event of default.
<b>Key Covenants:</b>	AWBC to provide further assurances to effectuate agreement; proceeds to be used only for working capital and other approved purposes; AWBC to preserve corporate existence and continue business; AWBC to provide updated 13-week budget on a weekly basis; restrictions on additional liens, indebtedness, investments, dispositions, transactions with affiliates, or accounting changes; no fundamental changes; no speculative transactions; no formation of new subsidiaries.
<b>Key Events of Default:</b>	Failure to pay principal when due; inaccuracy of representations or warranties; immediate default for breach of superpriority or security provisions or covenants; 5-day notice with opportunity for cure for other breaches.
<b>Governing Law:</b>	New York.

## APPLICABLE AUTHORITY FOR APPROVAL OF DIP FACILITY

### A. Incurrence of Secured Debt Under Section 364(c)

41. AWBC's reorganization efforts hinge on access to postpetition financing. Section 364 of the Bankruptcy Code distinguishes among (a) obtaining unsecured credit in the ordinary course of business, (b) obtaining unsecured credit outside the ordinary course of business, (c) obtaining credit with specialized priority or on a secured basis and (d) obtaining secured credit by granting a senior or pari passu lien on already encumbered property. In other words, section 364 is "structured with an escalating series of inducements . . ." that may be offered to attract postpetition

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1 financing. *Sapir v. CPQ Colorchrome Corp. (In re Photo Promotion Assocs.,*  
2 *Inc.)*, 87 B.R. 835, 839 (Bankr. S.D.N.Y. 1988), *aff'd*, 881 F.2d 6 (2d Cir.  
3 1989).

4 42. Accordingly, if a debtor cannot obtain postpetition financing  
5 on an unsecured basis, a bankruptcy court may authorize such debtor to obtain  
6 credit or incur debt on a superpriority administrative expense status, secured by  
7 a senior lien on unencumbered property or secured by a junior lien on  
8 encumbered property. *See* 11 U.S.C. § 364(c); *In re Garland Corp.*, 6 B.R.  
9 456, 461 (B.A.P. 1st Cir. 1980) (secured credit under section 364(c)(2)  
10 authorized, after notice and a hearing, upon showing that unsecured credit  
11 unobtainable); *In re Monach Circuit Indus., Inc.*, 41 B.R. 859, 862 (Bankr. E.D.  
12 Pa. 1984) (“[sections] 364(c)(1), (c)(2) and (c)(3) allow a court to grant to a  
13 creditor a priority over administrative expenses or a lien . . .”); *In re The Crouse*  
14 *Group, Inc.*, 71 B.R. 544, 550 (Bankr. E.D. Pa. 1987) (requiring debtor to show  
15 reasonable effort to seek financing under section 364(a) or (b) before incurring  
16 superpriority administrative expense).

17 43. As set forth above and in the Rusnak Declaration, AWBC  
18 does not believe that it would have been able to obtain postpetition financing on  
19 terms more favorable than those contained in the DIP Credit Agreement from  
20 any source other than the DIP Lender. The ongoing oversight by the  
21 Regulators, the risk of regulatory action, and the uncertainty surrounding the  
22 Bank’s recapitalization all have made it difficult for AWBC to attract financing.  
23 Moreover, the DIP Facility is an important feature of the Sale proposed in  
24 connection herewith and serves as a material portion of the Purchaser’s  
25 consideration, since the Purchaser will have the option to credit bid the  
26 indebtedness owing under the DIP Facility as part of the purchase price. Such

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1 financing would not be practicable by a third-party lender in light of the DIP  
2 Lender/Purchaser's unique knowledge of AWBC, particularly given its  
3 extensive due diligence in connection with the Sale.

4 44. Based on all the foregoing, AWBC believes that it would not  
5 have been able to obtain debtor-in-possession financing on more favorable  
6 terms from other sources. *See, e.g., Bray v. Shenandoah Fed. Savs. & Loan*  
7 *Ass'n (In re Snowshoe Co., Inc.)*, 789 F.2d 1085, 1088 (4th Cir. 1986) (section  
8 364 "imposes no duty to seek credit from every possible lender before  
9 concluding that such credit is unavailable."); *In re Sky Valley, Inc.*, 100 B.R.  
10 107, 113 (Bankr. N.D. Ga. 1988) ("[I]t would be unrealistic and unnecessary to  
11 require [the debtor] to conduct an exhaustive search for financing" when few  
12 lenders likely can or will provide the necessary credit.).

13 45. Under these circumstances, this Court has ample authority to  
14 authorize AWBC to obtain debtor-in-possession financing on the terms set forth  
15 in the DIP Credit Agreement.

16 **B. The DIP Facility Is Necessary to Preserve Assets of AWBC's Estate**

17 46. As noted above, AWBC has an immediate need to access  
18 additional operating capital. Access to additional operating capital will enable  
19 AWBC to demonstrate to its regulating entities, vendors, suppliers, and  
20 employees that it has sufficient liquidity to continue to operate its businesses,  
21 maintain its properties, and pay necessary expenses during the crucial first days  
22 of its reorganization efforts and the pendency of this Chapter 11 case.

23 47. Unless this Court authorizes the DIP Credit Agreement,  
24 AWBC will be unable to fund its Chapter 11 case, or pay for services and  
25 expenses necessary to preserve and maximize the value of AWBC's business.  
26 Indeed, absent sufficient funds to support its business, AWBC's ability to

1 consummate the Sale will be significantly hampered and the value of the Shares  
2 will quickly erode.

3 **C. The Terms of the DIP Facility Are Fair, Reasonable and**  
4 **Appropriate**

5 48. In order to obtain much-needed capital and help reduce the  
6 risk of adverse regulatory intervention before consummation of the Sale,  
7 AWBC negotiated the DIP Credit Agreement with the Purchaser through a  
8 good-faith, arm's-length process. AWBC believes that the DIP Credit  
9 Agreement contains terms that are in the best interests of AWBC, its estate, and  
10 other parties-in-interest.

11 49. The terms and conditions of the DIP Facility are fair,  
12 reasonable and appropriate under the circumstances. AWBC believes, in its  
13 reasonable business judgment, that the DIP Facility is the best financing option  
14 available under the present circumstances, particularly given the expedited  
15 timeframe within which it must meet the Regulators' concerns. Further, with  
16 the inclusion of the Carve-Out, the DIP Facility would not directly or indirectly  
17 deprive AWBC's estate or other parties-in-interest of possible rights and  
18 powers by inappropriately restricting the services for which professionals may  
19 be paid in this case. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 38 (Bankr.  
20 S.D.N.Y. 1990) (Courts generally "insist on a carve out" for professional fees  
21 for AWBC, committee and possible trustee "in order to preserve the adversary  
22 system. Absent such protection, the collective rights and expectations of all  
23 parties-in-interest are sorely prejudiced."). Likewise, the various fees and  
24 charges required under the DIP Facility are reasonable and appropriate under  
25 the circumstances, as they have been capped at \$100,000. *See Resolution Trust*  
26 *Corp. v. Official Unsecured Creditors Comm. (In re Defender Drug Stores,*

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1 *Inc.*), 145 B.R. 312, 316 (B.A.P. 9th Cir. 1992) (approving financing facility  
2 pursuant to section 364 that included a lender “enhancement fee”); *see also*,  
3 *e.g.*, *In re Fortunoff Fine Jewelry and Silverware, LLC*, Case No. 08-10353  
4 (JMP) (Bankr. S.D.N.Y. Feb. 22, 2008); *In re Delphi Corp.*, No. 05-44481  
5 (RDD) (Bankr. S.D.N.Y. Jan. 5, 2007).

6 **D. Application of the Business Judgment Standard**

7 50. Bankruptcy courts routinely defer to a debtor’s business  
8 judgment on most business decisions, including the decision to obtain credit or  
9 incur debt, unless such decision fails the arbitrary and capricious standard. *See*  
10 *Trans World Airlines v. Travellers Int’l AG (In re Trans World Airlines, Inc.)*,  
11 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that approval of interim loan,  
12 receivables facility and asset-based facility “reflect[ed] sound and prudent  
13 business judgment . . . [was] reasonable under the circumstances and in the best  
14 interests of [the debtor] and its creditors”); *Ames*, 115 B.R. at 40 (The court  
15 should defer to Debtor’s “reasonable business judgment . . . so long as the  
16 financing agreement does not . . . leverage the bankruptcy process” and its  
17 purpose is to benefit the estate rather than another party-in-interest.). Indeed,  
18 “[m]ore exacting scrutiny [than the business judgment standard] would slow the  
19 administration of [AWBC’s] estate and increase its cost, interfere with the  
20 Bankruptcy Code’s provision for private control of administration of the estate,  
21 and threaten the court’s ability to control in case impartially.” *Richmond*  
22 *Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

23 51. AWBC exercised its reasonable business judgment in  
24 determining that the DIP Facility was appropriate and the best available  
25 financing option under the circumstances and has satisfied the legal  
26 requirements to incur the DIP Obligations on the terms and conditions set forth

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1 in the DIP Credit Agreement. AWBC believes that the DIP Credit Agreement  
2 contains terms that are fair, reasonable, and in the best interests of AWBC and  
3 its estate. Accordingly, AWBC respectfully submits that it should be  
4 authorized to enter into the DIP Credit Agreement and obtain access to the DIP  
5 Facility from the DIP Lender on the priming lien, secured and administrative  
6 “superpriority” basis described herein.

7 **E. The Use of Cash Collateral is Appropriate**

8 52. The use of estate property by a debtor-in-possession is  
9 governed by section 363 of the Bankruptcy Code. Section 363(c)(1) provides  
10 that a debtor may use estate assets in the ordinary course of its business without  
11 notice or a hearing. 11 U.S.C. § 363(c)(1). Section 363(c)(2), however,  
12 permits a debtor to use, sell or lease cash collateral only if the entity with an  
13 interest in the cash collateral consents or the Court authorizes such use. 11  
14 U.S.C. § 363(c)(1)-(2). The DIP Lender has consented to AWBC’s use of the  
15 Cash Collateral securing the DIP Facility pursuant to the terms of the proposed  
16 DIP Order. Therefore, this Court has authority to enter the DIP Order pursuant  
17 to section 363(c)(2) of the Bankruptcy Code.

18 **F. Support for Modification of Automatic Stay**

19 53. As set forth more fully in the proposed DIP Order, the  
20 proposed DIP Facility and the DIP Credit Agreement contemplate a  
21 modification of the automatic stay established pursuant to section 362 of the  
22 Bankruptcy Code to permit the DIP Lender, in its sole discretion, to: (a) file  
23 financing statements, mortgages, deeds of trust, assignments of leases and rents  
24 or similar documents to evidence the DIP Facility Liens; (b) give AWBC any  
25 notice provided for in the DIP Credit Documents; (c) exercise other rights or  
26 remedies under the DIP Credit Documents (including the exercise of rights and

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1 remedies pertaining to the DIP Facility Liens on the DIP Facility Collateral)  
2 upon the occurrence of an Event of Default, after giving five (5) business days  
3 notice in writing, served by hand or telefax upon the Court, AWBC and its  
4 counsel (and, if appointed, any trustee for AWBC), counsel to any official  
5 committee appointed in this case, and the office of the United States Trustee;  
6 and (d) take such other actions permitted or required under the DIP Credit  
7 Documents.

8           54. Stay modification provisions such as these are ordinary and  
9 usual features of postpetition financing facilities and, in AWBC's business  
10 judgment, are reasonable under the present circumstances. Accordingly,  
11 AWBC respectfully requests that the Court authorize the modification of the  
12 automatic stay in accordance with the terms set forth in the DIP Order and the  
13 DIP Credit Documents.

14                   **FINAL APPROVAL SHOULD BE GRANTED**

15           55. AWBC seeks approval of the relief requested in this Motion  
16 in light of the immediate and irreparable harm that AWBC's estate will incur  
17 unless it obtains the financing necessary to sustain its business and fund the  
18 Case. Indeed, AWBC anticipates accessing the DIP Facility as soon as  
19 practicable after the DIP Order is entered. Access to the DIP Facility will  
20 enable AWBC to demonstrate to its vendors, suppliers, employees, lenders and  
21 regulating entities that it has sufficient working capital and liquidity to continue  
22 to operate its business, maintain its properties and pay necessary expenses  
23 during the crucial first days of its reorganization efforts and the pendency of  
24 AWBC's Case.

25           56. Accordingly, AWBC submits that entry of the DIP Order, in  
26 the time periods and for the financing amounts requested herein, is appropriate.

MOTION FOR DIP FINANCING - 27

dc-619910

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1 AWBC respectfully requests that the Court conduct a hearing on this Motion  
2 and authorize AWBC to incur debt in an amount up to \$2 million under the DIP  
3 Credit Agreement, which AWBC shall be permitted to use for, *inter alia*,  
4 (a) working capital for operating AWBC's business; (b) payment of fees, costs  
5 and charges incurred in connection with the DIP Facility; and (c) the payment  
6 of certain other obligations in accordance with relief granted by this Court. For  
7 the reasons set forth above, AWBC submits that immediate access to this  
8 amount under the DIP Facility is necessary to preserve the value of AWBC's  
9 estate for the benefit of its creditors and other parties-in-interest.

#### 10 **REQUEST FOR WAIVER OF STAY**

11 57. AWBC seeks a waiver of any stay of the effectiveness of the  
12 DIP Order that may be imposed by Bankruptcy Rule 6004 or any other  
13 Bankruptcy Rule. As set forth above, AWBC requires immediate access to the  
14 financing to be provided under the DIP Credit Agreement to prevent potentially  
15 irreparable damage to AWBC's business, operations, the value of the Shares,  
16 and AWBC's ability to consummate the Sale. Accordingly, AWBC submits  
17 that ample cause exists to justify a waiver of any stay imposed by Bankruptcy  
18 Rule 6004 or any other the Bankruptcy Rule, to the extent applicable.

#### 19 **NOTICE**

20 58. Notice of this Motion has been provided to (i) any entities  
21 known to have asserted any Encumbrance in or upon the Shares or the Other  
22 Purchased Assets; (ii) all federal, state, and local regulatory or taxing authorities  
23 or recording offices which have a reasonably known interest in the relief  
24 requested by the Motion, including the FDIC and Washington DFI; (iii) the  
25 Office of the United States Trustee; (iv) the Securities and Exchange  
26 Commission; (v) the Internal Revenue Service; (vi) Wilmington Trust

MOTION FOR DIP FINANCING - 28

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1 Company; (vii) U.S. Bank; (viii) Preferred Trust Securities, Ltd. VII;  
2 (ix) Preferred Trust Securities, Ltd. X; (x) Preferred Trust Securities, Ltd. XXII;  
3 (xi) Preferred Trust Securities, Ltd. XXV; (xii) Bank of New York Mellon;  
4 (xiii) all entities that have requested notice in accordance with Bankruptcy Rule  
5 2002; (xiv) all other known creditors of AWBC; and (xv) counsel to any official  
6 committee established in this Chapter 11 case. In light of the nature of the  
7 relief requested herein, AWBC submits that no other or further notice is  
8 required.

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1 **CONCLUSION**

2 WHEREFORE, AWBC respectfully requests this Court enter an order,  
3 substantially in the form annexed hereto, granting the relief requested in this  
4 Motion and such other and further relief as may be just and proper.  
5

6  
7 DATED this 28th day of October, 2010 FOSTER PEPPER PLLC

8  
9 /s/ Dillon E. Jackson

10 Dillon E. Jackson, WSBA #1539

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